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Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 93

GULF OIL CORPORATION,

Petitioner,

against

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Facts

Respondent is the owner of a large warehouse located at Lynchburg, Virginia (ff. 9-10). Respondent had on his premises a gasoline pump, fuel for which was purchased from time to time from the petitioner (f. 11). On March 8, 1944, while a delivery of gasoline was being made by the petitioner, its servants, agents or employees, gasoline was caused to escape from the truck which was making the delivery and was caused to explode and set on fire respondent's warehouse (ff. 12, 13). As a result of this fire and explosion, the respondent's warehouse and the contents contained therein were entirely destroyed. The contents belonged in part to the respondent and the remainder to some 350 customers. As a result of this destruction, damage was sustained in the amount of $365,529.77 (f. 28). Suit was instituted in the District Court of the Southern District of New York for the loss sus-

tained by the respondent personally and for the goods of his various customers, to whom he was responsible under various warehousing agreements (ff. 15, 19, 24, 27).

Respondent is a resident of Lynchburg, Virginia (f. 9). Petitioner is a corporation organized under the laws of Pennsylvania (f. 8) having its principal place of business at Pittsburgh, Pennsylvania (f. 53). Petitioner filed a certificate designating the Secretary of State of the State of New York to accept service of process in its behalf in New York State (f. 76). Petitioner actually does business in New York State and maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (ff. 75, 53). It appears clear, therefore, that diversity of citizenship exists between the parties hereto in that respondent is a resident of Virginia and petitioner is a corporation organized under the laws of Pennsylvania. In addition, the amount sued for exceeds $3,000.00, exclusive of interest and costs (f. 28). After suit was started, petitioner moved by an order to show cause to dismiss the action on the ground that the District Court of the Southern District of New York should not accept jurisdiction of the action upon the following grounds:

A. That the venue is improper because this tort action arose in Virginia and the respondent is a resident of Virginia and the petitioner is a Pennsylvania corporation (f. 33).

B. On the further ground that it would not serve the convenience of the petitioner to try the action in this district (ff. 34-38).

The learned lower Court reached the conclusion that the venue in this district was technically proper (f. 140), but granted the motion to dismiss solely on the ground that in its discretion, the learned lower Court would refuse to assume jurisdiction (f. 140).

From this determination the respondent Gilbert appealed to the Circuit Court of Appeals for the Second Circuit and the latter reversed and remanded the decision of the learned lower Court, upholding the respondent's contention that the District Court has jurisdiction (pp. 59 to 65; Transcript of Record). One Judge dissented from this decision (pp. 65-67; Transcript of Record).

The respondent contends that the petition for the Writ of Certiorari should be denied upon the following grounds:

(A) The question which has been decided follows well defined principles and does not involve any new or unsettled question of law.

(B) The action at bar involves a common law tort which is a transitory cause of action upon which suit may be brought in any jurisdiction in which the defendant can be properly found.

(C) Technical jurisdiction and venue exist herein.

(D) That in matters of this kind, the acceptance of jurisdiction by the Federal District Court is not discretionary but mandatory.

(E) That the facts involved show that no undue inconvenience or burden will be placed upon the petitioner if the suit is tried in the District Court for the Southern District of New York.

ARGUMENT

1. There is technical jurisdiction and venue in the case at bar.

Respondent is a resident of Lynchburg, Virginia (f. 9). Petitioner is a corporation organized under the laws of the State of Pennsylvania (f. 8). The amount in controversy is $365,529.77 (f. 28).

From these facts, we readily note that this is an action which may be brought in the federal court solely by reason of the fact that it is based on diversity of citizenship and by reason of the fact that the amount in controversy exceeds $3,000.00. In addition, the petitioner is doing business in this state. It maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (f. 8). Furthermore, in accordance with a certificate duly filed, petitioner appointed the Secretary of State of the State of New York to accept service of process that may be made upon it in New York State (f. 76).

From these uncontroverted facts, the Court has jurisdiction of the subject matter of the action by reason of the diversity of citizenship and the amount in controversy. The petitioner is before the Court by reason of the service of process in this district upon its designated agent, the Secretary of State. As a general rule, in actions which come to the federal court solely by reason of diversity of citizenship, the action must be brought either in the district in which plaintiff resides, or in that in which the defendant resides. (Section 112, Title 28, United States Annotated Code, formerly Section 51 of the Judicial Code.) However, the defendant's privilege to be sued in the district of its residence only may be waived by failure to object or by conduct which amounts to submission.

General Investing Co. v. *Lake Shore Ry.*, 260 U. S., 261;
Commercial Casualty Co. v. *Consolidated Stone Co.*, 278 U.S. 177.

A designation of an agent for acceptance of service in a jurisdiction other than that of residence constitutes such a waiver. This principle finds full expression in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

By force of this decision, this Court expressly held that an action could be brought in a federal district in which neither the plaintiff nor the defendant resided so long as the defendant had agreed to accept service in such jurisdiction by virtue of the fact that it had designated the Secretary of State, or some other duly qualified agent, for such purpose.

2. An action transitory in nature may be tried in any jurisdiction in which the defendant can be found and the Court must accept jurisdiction if the parties are properly before it.

The learned District Court found that technical jurisdiction and venue exists in this case but declined to accept jurisdiction solely on the ground of discretion (f. 14). The Circuit Court of Appeals in reversing this holding in the majority opinion (pp. 59-65; Transcript of Record) in effect held that the assumption of jurisdiction in a tort case of this character is not subject to discretion. The dissenting opinion of the learned Justice Augustus N. Hand (65-67) does not dispute this contention, but is based solely on the doctrine of *forum non conveniens*.

In reviewing a long line of precedents, we find that in transitory tort actions the federal courts have felt im-

pelled to accept jurisdiction if the parties were properly before it, regardless of where the tort occurred. In the leading case of *Dennick* v. *Central R.R. Co.*, 103 U. S. 11, the facts showed that the deceased died in New Jersey of injuries sustained in that jurisdiction. Suit was instituted in New York by an administratrix appointed in New York. The Court overruled defendant's objection to the venue when the case was instituted in New York:

> "The action in the present case is in the nature of a trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court for the United States for the Northern District were competent to try such a case when the parties were properly before it."

This decision was approved in *Atcheson Ry. Co.* v. *Sowers*, 213 U. S. 55, where a citizen of Arizona recovered in a Texas Court for injuries occurring in New Mexico.

See also:

St. Bernard v. *Shane*, 220 Fed. 852;
Mattison v. *Boston & Maine R.R. Co.*, 205 Fed. 821.

The rule is well stated in the opinion in the case of *Kroger Grocery Co.* v. *Reddin*, 128 F. (2nd) 787.

> "From the standpoint of justice, morals and common sense there is no reason why a transitory cause of action, whether recognized by common law or created by statute, should not be enforceable in accordance with the substantive law of the state where the cause of action arose, in any Court in the country which has jurisdiction of the subject matter and can obtain jurisdiction of the parties."

See also:

Stewart v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445;

Mann v. *Pacific Atlantic S.S. Co.*, 10 Fed. Supp. 527;

Rose v. *Phillips Packing Co.*, 21 Fed. Supp. 485.

In *Evey* v. *Mexican Central R.R. Co.*, 81 Fed. 294, the Court held that under the authority of *Dennick* v. *Central R.R. Co.*, 103 U. S. 11, the federal court must assume jurisdiction when the parties are before it and technical jurisdiction exists.

Again in the case of *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, at page 40, the Supreme Court clearly and unequivocally set forth the doctrine that discretion does not exist to permit the denial of jurisdiction in a proper case:

> "They assume to criticize that Court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that Court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction (*Cohen v. Virginia*, 6 Wheatley 264, 402), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied."

In the case of *Smith* v. *Empire State Idaho Mining & Development Company*, 127 Fed. 462, a resident of Idaho sued a New York corporation for personal injuries sustained in Idaho in the Federal Court of the State of Washington. Jurisdiction of the defendant was procured by service of process on a resident agent. The Court discussed the matter of convenience of witnesses and the burden involved in bringing a suit in a foreign jurisdiction, and held, nevertheless, that it was compelled to assume jurisdiction.

> "I deem it unnecessary to discuss these cases for the reason that the decision of this Court must be controlled by the decisions of the Supreme Court and the Circuit Court of Appeals for the Ninth Circuit in the following cases: *Dennick* v. *Railroad Company*, 103 U. S. 11; *New York R. Company* v. *Estelle*, 147 U. S. 591; *Stewart* v. *Railroad Company*, 168 U. S. 445; *Steamship Company* v. *Kane*, 170 U. S. 100; *Denver R. G. R. Company* v. *Roller*, 100 Fed. 738. * * *The jurisdiction does not rest upon comity but upon the positive provisions of law. Therefore, the Court has no discretionary power to refuse to take cognizance of the case."

In admiralty, this Court held that discretion could be exercised by a federal tribunal as to whether to assume or deny jurisdiction of a cause between foreigners to the tribunal.

> *The Belgenland*, 114 U. S. 355;
> *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515.

In cases involving the internal affairs of a corporation, the federal courts have usually refused to exercise jurisdiction if the actions were brought in forums other

than the domicile of the corporation. This exercise of discretion follows well defined law. The Supreme Court enunciated this doctrine in *Rogers* v. *Guaranty Trust Company of New York*, 288 U. S. 123.

> "It has long been settled doctrine that a court, state or federal,—sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state, but will leave controversies as to such matters to the Courts of the State of the domicile."

To the same effect, see also:

Cohen v. *American Window Glass Co.*, 126 Fed. (2nd) 111;
Weiss v. *Routh*, 149 Fed. (2nd) 193.

However, even in this line of cases, unless great hardship or inconvenience will fall upon the corporation, it is an abuse of discretion to deny jurisdiction in a forum other than that of corporate domicile.

Williams v. *Green Bay & Western R. Co.*, 90 Law Ed. (U. S.) 247;
Koster v. *American Lumbermen's Mutual Cas. Co.* (October 1945 Term, decided Feb. 4th, 1946, Docket No. 19927 U. S. C. C. A. (2nd Circuit)).

The petitioner relies greatly on the decisions of the New York courts in *Gregonis* v. *P. R. Coal & Iron Co.*, 235 N. Y. 152 and *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244 in its contention that since New York courts in their discretion may assume or deny jurisdiction of tort actions involving non-residents, the federal district courts should do likewise.

The fallacy in this argument becomes readily obvious when consideration is taken of the well established rule that venue and jurisdiction in the Federal Courts are not affected by state law or statute.

This proposition is well stated in the opinion of the Court in the case of *Anderson* v. *Standard Accident Insurance Company*, 36 Fed. Supp. 1:

> "In any event, the operation of no state law respecting the venue of causes can impair this jurisdiction and power of the District Courts of the United States. *Goldey* v. *Morning News of New Haven*, 156 U. S. 518; *15* Supreme *Court*, *559*, 39 L. Ed. 517; *East Tennessee V. & G. R. Company et al.* v. *Atlanta & F. R. Co.*, C. C. S. D., Georgia, W. D. 1892, 49 F. 608, 15 L. R. A. 109; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 8 Cir. 1907, 156 Fed. 1; *Creager* v. *P. F. Collier & Son Co. et al.*, D. C. S. D., Texas, Brownsville 1929, 36 Fed. (2nd) 781; *Junk* v. *R. J. Reynolds Tobacco Co.*, D. C. W. D., Virginia 1938, 24 Supp. 716."

This Court was careful to reaffirm this doctrine in its decision in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, where this Court expressly held that federal procedure was not subjected to the requirement of the New York law although jurisdiction was conferred by service of process effected in accordance with Section 210 of The General Corporation law of New York.

> "In finding an actual consent by the Bethlehem to be sued in the courts of New York federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a set of facts which will authorize the courts of the United States to take cognizance of a case."

3. The petitioner will not be inconvenienced by a trial in this forum and the matter of convenience does not govern the selection of the forum.

An examination of the cases discloses that the Federal Courts have expressly held that even though a defendant may be inconvenienced by being forced to defend an action in a forum selected by the plaintiff, distant from the place where the occurrence took place, still that would not constitute a ground for dismissal of the action provided the Court has jurisdiction of the parties in accordance with the federal statutes.

In the case of *Chesapeake & Ohio R. R. Co.* v. *Vigor*, 90 Fed. 2d, 7, the Circuit Court of Appeals of the Sixth District held as follows:

> "The plaintiff, it is true, may suffer some inconvenience or be put to some extra expense in producing witnesses to testify in court in an Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time."
>
> "We held that in *Southern Railroad Company* v. *Cochrane*, 56 Fed. 2d, 1019, the filing of a suit in such a jurisdiction *even though it was inconvenient to the defendant*, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction."

This decision was closely followed in *Baltimore & Ohio R. R. Company* v. *Clem*, 36 Fed. Supp. 703.

In the case of *Baltimore & Ohio R. R. Company* v. *Kepner*, 314 U. S. 44, the facts showed that the action arose

in Ohio. The plaintiff was a resident of Ohio. The plaintiff had a railroad line running in Ohio. The action was brought in the Eastern District of New York, where the plaintiff was doing business. The action was brought 700 miles from the place of residence of both the plaintiff and the defendant and yet it was held by the majority opinion of the United States Supreme Court that the action could be brought in the venue selected by the plaintiff, although the Federal Employers Act specified that the action could be brought in district of residence of the defendant, or where the action arose, or where the defendant is an inhabitant.

In the case of *Miles v. Illinois Central R. R.*, 315 U. S. 698, the United States Supreme Court, following its holding in the *Baltimore & Ohio R. R. Company* v. *Kepner* case, refused to enjoin a suit in Missouri brought by the plaintiff, a resident of Tennessee, against the defendant, a resident of Tennessee, for an action which arose in Memphis, Tennessee. Again, the Court expressly held that although the defendant was inconvenienced by having the suit brought so far distant from the place where the parties resided and the action arose, still that was no bar to the bringing of the action in the forum selected by the plaintiff.

To the same effect, see also:

Hoffman v. *Foraker*, 274 U. S. 21.

The petitioner urged in the original motion that it would be very convenient to have this action brought in Lynchburg, Virginia, where the respondent resides (f. 54). The petitioner cannot restrict respondent and compel him to bring action solely in the district in which the respondent resides. The respondent is at liberty to bring the action in the District Court, in which petitioner resides (Section 112, Title 28, U. S. Annotated Code), or in any

district in which the petitioner has permitted itself to be sued. From an equitable and practical point of view, the respondent could with perfect right sue the petitioner where it is a resident, namely, in the district of which Pittsburgh is a part. The petitioner could surely not complain of improper venue under such circumstances. Pittsburgh is approximately 500 miles from Lynchburg, Virginia. New York is about 400 miles from Lynchburg, Virginia, with excellent railroad connections. We will attempt to analyze petitioner's claims as to inconvenience which upon close examination appear to be entirely without merit.

There is no dispute, and the petitioner does not claim that there is any eye witness to this occurrence other than the driver of the truck and the respondent and his employees (ff. 88-89). These persons will be produced upon the trial. The fire officials who appeared after the fire will be produced upon the trial. The expert engineers and others who examined the site of the fire and the explosion and who made their findings all are residents of New York City (f. 89). The appraiser who examined the property which was damaged resides in North Carolina. The experts which the petitioner will produce are certainly under its jurisdiction and can be brought anywhere, and, as a matter of fact, none of these experts resides in Lynchburg. Of the 350 customers whose goods were damaged, at least 200 or 250 are no longer in the Lynchburg area. They are scattered because of war conditions to various parts of the country. Many of them are close to New York City where they are employed in war plants. It may not even be necessary to have the testimony of these customers since the damages may well be established by proof on the part of the respondent and his employees and various appraisers who made the examination of the goods before and after the fire.

There should be no difficulty whatsoever in the proof of local ordinances. They are codified, bound and certi-

fied and are readily obtainable and provable. Their accuracy can be attested to by a deposition of the clerk of the City of Lynchburg.

In the final analysis the respondent must prove his case by a preponderance of evidence. It is incumbent upon the respondent to produce full and complete proof, and the respondent is fully prepared to do so in this forum. The arguments by the petitioner attempt to limit the respondent to a suit solely in Lynchburg (ff. 116, 117). The Court can readily realize that this action, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, the respondent will have an opportunity to try this case free from local influences and before a jury which has no previous knowledge of any of the facts herein.

As pointed out in the previously cited cases in this section of the brief, the Federal Courts by extension of the right to bring a transitory tort action in any venue in which the defendant can be found have approved actions in venues which in some instances cause inconvenience or additional expense to a defendant. However, the inconvenience which may be suffered in this case is not unbearable or very expensive. The petitioner is a large and well organized corporation having full and complete facilities to handle matters of this kind.

The further argument raised by the petitioner to the effect that it would like to implead Jennings-Watts Oil Company, Inc., a resident of Lynchburg, Virginia, does not have any bearing in this action (ff. 50, 51). The petitioner states that there exists between Jennings-Watts Oil Company, Inc. and itself a contract which was in full force and effect on March 8th, 1944, containing an indemnity clause by means of which Jennings-Watts Oil Company, Inc. will indemnify the petitioner against loss such

as the one alleged in the complaint (f. 5f). If this action were brought in Pennsylvania in the district in which petitioner resides, certainly the petitioner could not implead Jennings-Watts Oil Company, Inc. However, that would have no bearing on the ability of the petitioner to recoup its loss in a separate action based on the contract of indemnification. These contracts, as the Court well knows, give the right to the petitioner or to any party similarly situated, to settle any action in an amount which is deemed fair and gives recourse for indemnification in the event that any loss is actually sustained by the party sought to be indemnified. The petitioner, therefore, can in no way be prejudiced in the final analysis if it cannot implead the Jennings-Watts Oil Company, Inc. in this action. The respondent is certainly not bound to seek a forum in which the petitioner is able to bring in all the other parties whom it may see fit to join as defendants. To do so would make it manifestly impossible to try any law suit since there may always be some defendants who cannot be reached with process in the district in which the action is properly brought.

CONCLUSION

It is respectfully submitted that the petition for the Writ of Certiorari be denied.

Respectfully submitted,

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